IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

LEONARD PFLANZ,	:	APPEAL NO. C-070663 TRIAL NO. A-0610471
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
LESLIE HOLDEN, ESQ.,	:	
and	:	
ARNOLD S. LEVINE CO., LPA, d/b/a LAW OFFICES OF ARNOLD S. LEVINE,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

In December of 2004, plaintiff-appellant Leonard Pflanz hired defendant-appellee attorney Leslie Holden, who was employed by defendant-appellee Arnold S. Levine Co., LPA, d/b/a Law Offices of Arnold S. Levine ("Levine"), to represent him in a lawsuit filed by his brother in Clermont County. Pflanz's brother obtained a default judgment on February 7, 2005. On February 24, 2005, Holden told Pflanz that she was leaving Levine's firm. She offered to get the default judgment set aside and told Pflanz that she needed $263 for costs. Holden apparently filed three motions in the action, but she did not appear to argue and the motions were denied. Pflanz then hired lawyer

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[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

Timothy Nolan. On March 18, 2005, Nolan filed a notice of substitution of counsel. Nolan also filed a new motion to set aside the judgment, which was denied. Ultimately a $15,000 judgment was entered against Pflanz.

On December 1, 2006, Pflanz filed this action for legal malpractice against Holden and Levine. Levine answered and raised an R.C. 2305.11(A) statute-of-limitations defense on January 4, 2007. Holden did not answer the complaint. Levine filed a motion for summary judgment on April 19, 2007, based in part on the statute of limitations. Holden filed a motion for summary judgment on May 18, 2007, raising for the first time a statute-of-limitations defense. On July 10, 2007, Pflanz filed a motion for a default judgment against Holden based upon her failure to answer the complaint. On July 23, 2007, Pflanz filed a Civ.R. 41(A)(1)(a) notice of voluntary dismissal as to Levine. The trial court granted summary judgment in favor of Holden and Levine on August 16, 2007.

Pflanz's first assignment of error alleges that the trial court erred in granting Holden's motion for summary judgment because she had not asserted the statute of limitations as an affirmative defense in a responsive pleading.

Civ.R. 8(C) states that "[i]n pleading to a preceding pleading, a party shall set forth affirmatively * * * [the] statute of limitations * * * and any other matter constituting an avoidance or affirmative defense." Affirmative defenses other than those listed in Civ.R. 12(B) are waived if not raised in the pleadings or in an amendment to the pleadings.[2] The affirmative defense of the statute of limitations is waived if not asserted in an answer or an amendment to an answer.[3] An affirmative defense such as

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[2] See *Jim's Steak House, Inc. v. Cleveland*, 81 Ohio St.3d 18, 1998-Ohio-440, 688 N.E.2d 506; *Mills v. Whitehouse Trucking Co.* (1974), 40 Ohio St.2d 55, 320 N.E.2d 668.
[3] See *Hills v. Patton*, 3rd Dist. No. 1-07-71, 2008-Ohio-1343; *Drenning v. Blue Ribbon Homes*, 6th Dist. No. F-06-001, 2007-Ohio-1323.

the statute of limitations cannot be raised for the first time in a motion for summary judgment.[4]

Because Holden did not assert the statute-of-limitations defense in a responsive pleading or in an amendment to a pleading, she waived it. The trial court erred in granting summary judgment in favor of Holden on that basis. The first assignment of error is sustained.

We turn now to the third assignment of error, which alleges that the trial court erred in granting summary judgment in favor of Levine after Pflanz had filed his Civ.R. 41(A)(1)(a) notice of voluntary dismissal.

A plaintiff may dismiss all claims asserted against a defendant at any time prior to trial by filing a notice of dismissal under Civ.R. 41(A)(1)(a). Civ.R. 41(A)(1)(a) gives the plaintiff an absolute right to terminate his action voluntarily and unilaterally prior to trial without permission of the court.[5] A Civ.R. 41(A)(1)(a) dismissal is self-executing and divests the court of jurisdiction.[6] A dismissal without prejudice leaves the parties as if no action had been brought.[7]

The trial court had no jurisdiction to grant summary judgment in favor of Levine after Pflanz had filed his notice of dismissal.[8] The third assignment of error is sustained. We point out that Levine is no longer a party to this lawsuit.

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[4] See *Marok v. The Ohio State University*, 10th Dist. No. 07AP-921, 2008-Ohio-3170; *Taylor v. Meridia Huron Hospital of Cleveland Clinic Health System* (2000), 142 Ohio App.3d 155, 754 N.E.2d 810; *Carmen v. Link* (1997), 119 Ohio App.3d 244, 695 N.E.2d 28; *Mossa v. Western Credit Union, Inc.* (1992), 84 Ohio App.3d 177, 616 N.E.2d 571.
[5] See *Williams v. Thamann*, 173 Ohio App.3d 426, 2007-Ohio-4320, 878 N.E.2d 1070; *Thorton v. Montville Plastics & Rubber, Inc.*, 11th Dist. No. 2007-G-2760, 2007-Ohio-7115; *Andrews v. Sajar Plastics, Inc.* (1994), 98 Ohio App.3d 61, 647 N.E.2d 854.
[6] See id.; *State ex rel. Hunt v. Thompson* (1992), 63 Ohio St.3d 182, 586 N.E.2d 107.
[7] See *Denham v. New Carlisle*, 86 Ohio St.3d 594, 1999-Ohio-128, 716 N.E.2d 184.
[8] See *State ex rel. Hunt v. Thompson*, supra.

The second assignment of error, which alleges that the trial court erred in granting summary judgment in favor of Holden and Levine without making a factual determination as to when the attorney-client relationship had ended, is made moot by our disposition of the first and third assignments of error, and we decline to rule on it.

Therefore, the judgment of the trial court is reversed, and this case is remanded for further proceedings consistent with law and this Judgment Entry.

Further, a certified copy of this Judgment Entry shall constitute the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., CUNNINGHAM and **WINKLER, JJ.**

RALPH WINKLER, retired, from the First Appellate District, sitting by assignment.

To the Clerk:

Enter upon the Journal of the Court on October 8, 2008

per order of the Court _____.
Presiding Judge